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No. 85-5487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL MARNELL SMITH,

Petitioner,

v.

ALLYN R. SIELAFF,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITIONER'S BRIEF

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*J. LLOYD SNOOK, III
230 Court Square
Charlottesville, Virginia 22901
804-293-8185

RICHARD J. BONNIE
University of Virginia School of Law
Charlottesville, Virginia 22901

**Counsel of Record*

Counsel for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTIONS PRESENTED

1. When a court orders a pretrial mental evaluation of a capital defendant upon defense request to enable counsel to explore psychiatric defenses or claims in mitigation, is it constitutionally permissible for the prosecution to call the expert to testify about incriminating statements made by defendant during the evaluation when the statements are offered for the sole purpose of proving an aggravating circumstance and are not relevant to any claim in mitigation raised by the defense?

2. When constitutionally inadmissible testimony derived from a pretrial mental evaluation is introduced by the state to prove an aggravating circumstance at a capital sentencing proceeding, and the record reveals a substantial likelihood that the inadmissible evidence influenced the jury's decision to impose a death sentence, are the federal courts nonetheless obligated by this Court's decision in *Zant* v. *Stephens* to ignore the constitutional error and uphold the death sentence simply because the state proved another statutory aggravating circumstance that was untainted by the error?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
ASSIGNMENT OF ERROR	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
Pretrial Psychiatric Examinations	4
The Sentencing Hearing	5
Direct Appeal	8
Collateral Proceedings And The Decision Below	9
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. DR. PILE'S TESTIMONY ABOUT INCRIMINATING STATEMENTS MADE BY SMITH DURING A PRETRIAL MENTAL EVALUATION REQUESTED BY THE DEFENSE, WHEN INTRODUCED BY THE PROSECUTION FOR THE SOLE PURPOSE OF PROVING ITS CASE-IN-AGGRAVATION, WAS CONSTITUTIONALLY INADMISSIBLE.	12
A. Unless Affirmative Prosecutorial Use Of Information Derived From A Defense-Requested Mental Evaluation Is Proscribed, The Defendant Is Forced To Choose Between His Privilege Against Self-Incrimination And His Constitutional Right To An Adequate Mental Evaluation.	15
B. The Settled Principle That The Prosecution May Not Make Affirmative Use Of Evidence Derived From A Pretrial Mental Evaluation To Prove The Defendant's "Guilt" Also Applies To Proof Of Aggravating Circumstances At The Sentencing Phase Of A Capital Case.	24
C. The Permissibility Of Affirmative Prosecutorial Use Of A Defendant's Disclosures During A Pretrial Mental Evaluation Should Not Depend, As The Commonwealth Contends, On Who Requested The Evaluation.	25

Table of Contents Continued

Page

D. Affirmative Prosecutorial Use Of Evidence Derived From A Defense-Requested Mental Evaluation Is Already Prohibited In A Substantial Majority Of States And In The Federal Courts. 30

II. THE RECORD DEMONSTRATES THAT THE CONSTITUTIONALLY INADMISSIBLE TESTIMONY BY DR. PILE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT. 33

A. The Dangerousness Finding. 34

B. The Death Sentence. 36

III. NOTHING IN THIS COURT'S DECISION IN *ZANT* V. *STEPHENS* SUGGESTS THAT A PREJUDICIAL CONSTITUTIONAL DEFECT IN THE SENTENCING PROCESS SHOULD BE IGNORED SIMPLY BECAUSE THE STATE PROVED AN UNTAINTED STATUTORY PREDICATE FOR A DEATH SENTENCE. 37

A. The Fourth Circuit's Handling Of The Issue. . 37

B. This Court's Ruling In *Zant* v. *Stephens*. 39

CONCLUSION 45

APPENDIX A A-1

APPENDIX B A-3

APPENDIX C A-4

APPENDIX D A-5

TABLE OF AUTHORITIES

Page

Ake v. *Oklahoma*, ___ U.S. ___, 84 L.Ed.2d 53 (1985) ..... *passim*
Barefoot v. *Estelle*, 463 U.S. 880 (1983) 17
Battie v. *Estelle*, 655 F.2d 692 (5th Cir. 1981) 24, 25, 27, 28, 36
Brennan v. *Blankenship*, 472 F. Supp. 149 (W.D. Va. 1979) 16
Bruton v. *United States*, 391 U.S. 123 (1968) 44
Bullington v. *Missouri*, 451 U.S. 430 (1981) 11, 24
Cape v. *Francis*, 741 F.2d 1287 (11th Cir. 1984) 44
Chapman v. *California*, 386 U.S. 18 (1967) 11, 33, 44
Clark v. *State*, 627 S.W.2d 693 (Tex. Cr. App. 1981) 35
Collins v. *Auger*, 577 F.2d 1107 (8th Cir. 1978), *aff'g* 428 F. Supp. 1079 (S.D. Iowa 1977) 17, 18, 22, 23, 24
Conquest v. *Mitchell*, 618 F.2d 1053 (4th Cir. 1980) 26
Eddings v. *Oklahoma*, 455 U.S. 104 (1982) 15
Edney v. *Smith*, 425 F. Supp. 1038 (E.D.N.Y. 1976) *aff'd*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977) 16, 23
Estelle v. *Smith*, 451 U.S. 454 (1981) ..... *passim*
Fahy v. *Connecticut*, 375 U.S. 85 (1963) 35
Flamer v. *State*, 490 A.2d 104 (Del. 1984) 43
Gardner v. *Florida*, 430 U.S. 349 (1977) 38
Gholson v. *Estelle*, 675 F.2d 734 (5th Cir. 1982) 44
Giarratano v. *Commonwealth*, 220 Va. 1064, 266 S.E.2d 94 (1980) 30
Gibson v. *Commonwealth*, 216 Va. 412, 219 S.E.2d 845 (1975), *cert. denied*, 425 U.S. 994 (1976) ..... *passim*
Gibson v. *Zahradnick*, 581 F.2d 75 (4th Cir. 1975), *cert. denied*, 439 U.S. 996 (1978) ..... *passim*
Godfrey v. *Georgia*, 446 U.S. 420 (1980) 15
Green v. *Estelle*, 706 F.2d 148, *rehearing denied with opinion*, 712 F.2d 995 (5th Cir. 1983) 35
Houston v. *State*, 602 P.2d 784 (Alaska, 1979) 23
In re Spencer, 63 Cal. 2d 400, 406 P.2d 33, 46 Cal. Rptr. 753 (1965) 23
Lefkowitz v. *Cunningham*, 431 U.S. 801 (1977) 19
Lefkowitz v. *Turley*, 414 U.S. 70 (1973) 19
Linwood Briley v. *Bass*, 742 F.2d 155 (4th Cir. 1984) ... 38

Table of Authorities Continued

Page

Lockett v. *Ohio*, 438 U.S. 586 (1978) 38
Loe v. *United States*, 545 F.Supp. 667 (E.D. Va. 1982) .. 16
Milton v. *Wainwright*, 407 U.S. 371 (1972) 33, 35
Murphy v. *Waterfront Commission*, 378 U.S. 52 (1964) . 21
Noggle v. *Marshall*, 706 F.2d 1408 (6th Cir. 1983) 23
Noyes v. *State*, 516 P.2d 1368 (Okla. 1973) 20
Phelan v. *State*, 273 Ind. 542, 406 N.E.2d 237 (1980) ... 20
Pope v. *United States*, 372 F.2d 710 (8th Cir. 1967) 21
Ritter v. *Smith*, 726 F.2d 1505 (11th Cir. 1984) 44
Sherbert v. *Verner*, 374 U.S. 398 (1963) 19
Simmons v. *United States*, 390 U.S. 377 (1968) 18, 19
Smith v. *Procunier*, 769 F.2d 170 (4th Cir. 1985), *cert. granted*, *Smith* v. *Sielaff*, 106 S.Ct. 245 (1985) 3, 38
Smith v. *Wainwright*, 741 F.2d 1248 (11th Cir. 1984) .. 29, 30
State v. *Craney*, 347 N.W.2d 376 (Iowa 1975) 23
State v. *Pratt*, 284 Md. 516, 398 A.2d 421 (1979) 23
State v. *Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965) 20
State v. *Williams*, 690 S.W.2d 517 (Tenn. 1985) 44
Stromberg v. *California*, 283 U.S. 359 (1931) 40, 41, 42
Tuggle v. *Commonwealth*, 228 Va. 493, 323 S.E.2d 539 (1984), *vacated and remanded*, *Tuggle* v. *Virginia*, 471 U.S. ____, 85 L.Ed.2d 835 (1985), *aff'd on remand*, 229 Va. ____, 334 S.E. 2d 838 (1985) 30, 45
United States v. *Albright*, 388 F.2d 719 (4th Cir. 1968) 17, 21
United States v. *Alvarez*, 519 F.2d 1036 (3d Cir. 1975) 16, 17, 23, 24, 30
United States v. *Baird*, 414 F.2d 700 (2d Cir. 1969) 21
United States v. *Bennett*, 460 F.2d 872 (D.C. Cir. 1972) . 21
United States v. *Bohle*, 445 F.2d 54 (7th Cir. 1971) 17, 21
United States v. *Castenada*, 535 F.2d 605 (7th Cir.), *cert. denied*, 431 U.S. 847 (1977) 23
United States v. *Cohen*, 530 F.2d 43 (5th Cir. 1976) ... 17, 21
United States v. *Edwards*, 488 F.2d 1154 (5th Cir. 1974) 16
United States v. *Leonard*, 609 F.2d 1163 (5th Cir. 1980) 17, 22, 23

Table of Authorities Continued

	Page
United States v. *Reifsteck*, 535 F.2d 1030 (8th Cir. 1976)	21
White v. *Estelle*, 720 F.2d 415 (5th Cir. 1983)	35
Wood v. *Zahradnick*, 578 F.2d 980 (4th Cir. 1980)	16
Woodson v. *North Carolina*, 428 U.S. 280 (1976)	34
Zant v. *Stephens*, 462 U.S. 862 (1983)	*passim*
OTHER AUTHORITIES:	
ABA Criminal Justice Mental Health Standards (1984)	17, 31
American Law Institute, Model Penal Code § 4.09 (1985)	20, 31
Diamond and Louisell, "The Psychiatrist as an Expert Witness: Some Ruminations and Speculations," 63 *Mich. L. Rev.* 1325 (1965)	17
Fed. R. Crim. Proc. 12.2(c)	20, 21
J. MacDonald, *Psychiatry and the Criminal* (1958)	16
Read, "Can a Psychiatric Miranda" work? A California Perspective, 14 *Rutgers* L.J. 431 (1983)	21
S. Halleck, *Law in the Practice of Psychiatry: A Handbook for Clinicians* (1980)	16
Saltzburg, "Privileges and Professionals: Lawyers and Psychiatrists, 66 *Va. L. Rev.* 597 (1980)	23
Slobogin, "Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation," 31 Emory L.J. 31 (1982)	13
T. Gutheil & P. Appelbaum, *Clinical Handbook of Psychiatry and the Law* (1982)	16
18 U.S.C. § 4244	13
Va. Code Ann. § 19.2-264.4 (1983 Repl. Vol.)	16
Va. Code Ann. § 19.2-169.5E and 19.2-169.7 (1983 Repl. Vol.)	30
Westen, "Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another," 66 *Iowa L. Rev.* 741 (1985)	20
White, "The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases," 74 *J. Crim. L. & Criminology* 943 (1983)	13

OPINION BELOW

The opinion of the Fourth Circuit below is *Smith* v. *Procunier*, 769 F.2d 170 (4th Cir. 1985).

ASSIGNMENT OF ERROR

The Fourth Circuit erred in holding that even if Dr. Pile's testimony was constitutionally inadmissible, Smith's death sentence was constitutionally valid under this Court's decision in *Zant* v. *Stephens* because the error did not taint every aggravating circumstance found by the jury.

JURISDICTION

The appellate jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

The Virginia statute that states the substantive predicates for imposition of the death sentence is *Va. Code Ann.* § 19.2-264.2 (Repl. Vol. 1983):

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

According to *Va. Code Ann.* § 19.2-264.4(B), mitigating evidence may include, but shall not be limited to, the following:

> (i) The defendant has no significant history of prior criminal activity, or
>
> (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, or

(iii) the victim was a participant in the defendant's conduct or consented to the act, or

(iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or

(v) the age of the defendant at the time of the commission of the capital offense.

CONSTITUTIONAL PROVISIONS INVOLVED

This case presents violations of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, which are set out, in pertinent part, as follows:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

U.S. CONST. AMEND. V.

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

U.S. CONST. AMEND. VI.

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

U.S. CONST. AMEND. XIV.

STATEMENT OF THE CASE

Michael Marnell Smith was convicted and sentenced to death for the rape and murder of Audrey Weiler on May 23, 1977. He was tried by a jury in a trial beginning on October 31, 1977, and he was found guilty of November 2, 1977. After a sentencing hearing held on November 3, 1977, the jury returned with a recommendation of death. Judge Russell M. Carneal, Judge of the Circuit Court for the City of Williamsburg and the County of James City, imposed the death sentence on November 30, 1977.

The Supreme Court of Virginia affirmed the conviction and sentence in *Smith* v. *Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979).

Smith then filed a Petition for Writ of Habeas Corpus in the Circuit Court for the City of Williamsburg and the County of James City seeking to set aside his death sentence on nine grounds; the petition did not challenge the legality of Smith's conviction. An evidentiary hearing on Smith's claim that he had been denied effective assistance of counsel was held on November 8, 1979. Judge Carneal denied the Petition for Writ of Habeas Corpus by order dated April 16, 1980. Smith's Petition for Appeal to the Virginia Supreme Court of Virginia was denied, and his Petition for Writ of Certiorari was also denied. *Smith* v. *Morris, cert. denied*, 454 U.S. 1128 (1981).

Smith then filed his Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Eastern District of Virginia. The case was referred to a magistrate, but no new factual matters were developed. The District Court followed the recommendation of the magistrate with only one minor change, and dismissed the Petition on December 4, 1984.

An appeal was then taken to the United States Court of Appeals for the Fourth Circuit, and the Fourth Circuit affirmed on May 10, 1985. *Smith* v. *Procunier*, 769 F.2d 170 (4th Cir. 1985). A Petition for Rehearing or Rehearing En Banc was denied on June 26, 1985. This Court granted certiorari on October 21, 1985. *Smith* v. *Sielaff*, 106 S.Ct. 245 (1985).

STATEMENT OF FACTS

According to his confession, Michael Smith met Audrey Weiler on a beach near his home when he stopped to help her remove briars from her feet. He then grasped her arm and walked with her to a wooded area near the water, pulled out a knife and asked her to take off her clothes. She complied, while protesting. Smith, using a condom, had intercourse with Mrs. Weiler and then started choking her with both hands. He dragged her into the water and submerged her head for several seconds. He subsequently stabbed her in the back with the knife. He left the body and returned home. The medical examiner concluded that the immediate cause of death was drown-

ing, though the stab wounds and the strangulation could also have caused death.

Two days after the offense, investigators came to the Gospel Spreading Church Farm, the family farm where Smith lived and worked. When he was confronted with the investigators' suspicions, Smith asked for a Bible. His brother brought a Bible, and Smith and the investigators knelt and prayed. Smith then gave his confession.

Pretrial Psychiatric Examinations

On May 26, 1977, David F. Pugh was appointed to represent Smith; he immediately asked that Smith be examined to determine whether he was competent to stand trial. The examination was conducted by Dr. Palmaz, who stated that, in his opinion, Smith was competent to stand trial.

The circumstances of the offense and the prospect of a death sentence led Pugh to seek more comprehensive psychiatric evaluations of Smith in order to explore the availability of psychiatric defenses to the charges, and, especially, of claims in mitigation based on psychopathology. He first requested the Court to order Smith committed to Central State Hospital. This order was entered on July 1, 1977 and Smith was hospitalized for evaluation from July 5, 1977 to August 23, 1977. Dissatisfied with the results of the Central State evaluation, Pugh subsequently requested the trial court to appoint a private psychiatrist, Dr. Wendell J. Pile, to examine him. This order was entered on September 28, 1977, App. 1, and Smith was examined at Dr. Pile's office on October 1, 1977.

Under a decision of the Virginia Supreme Court then in force, statements made by the defendant during a pretrial psychiatric evaluation could be used affirmatively by the prosecution to prove the elements of its case. *Gibson* v. *Commonwealth*, 216 Va. 412 (1975). Moreover, the standard practice in cases involving any court-ordered evaluation, whether requested by the defense or the prosecution, was for the examiner to send copies of the report to the court, the prosecution and the defense attorney. Drs. Dimitris and Pile were both

explicitly directed to do so in the respective court orders directing them to examine Smith.

Mr. Pugh had advised Smith not to discuss the offense with which he was charged or any prior offenses with anyone other than himself and co-counsel. At the outset of the Central State evaluation, Dr. James Dimitris, Chief Psychiatrist on the Forensic Unit, warned Smith that anything he said during the evaluation could "be used one day against you in a court of law." App. 113. Throughout the evaluation, however, he inquired about Smith's criminal behavior and told Smith that it would be "helpful" if Smith discussed these matters and Smith did so. App. 117. Dr. Pile said nothing to Smith before or during his evaluation regarding the purposes of the evaluation or the uses to which the information could be put. In particular, he did not advise Smith that a copy of his report would be sent to the prosecution and that his statements could be used against him by the prosecution. App. 90.

In his letter to the court and counsel, dated October 1, 1977, Dr. Pile reported that Smith had "said he came close to [raping] a girl who was riding the school bus he was driving, but after he tore her clothes off he thought better of it and did not do so." This incident, which had occurred, according to Smith, at least 13 years earlier when he was a teenager, had not led to any arrest and was not previously known either to defense counsel or to the Commonwealth. Dr. Pile also noted his diagnostic impressions as "sociopathic personality; sexual deviation (rape)." App. 45.

The Sentencing Hearing

At the sentencing hearing, the prosecution put on four witnesses. First, Dr. Pile was called to tell the jury what Petitioner had told him about the school bus incident.

Q. Did he tell you anything about the girl on the school bus?

A. He did.

Q. What did he say about that?

At this point, Mr. Pugh objected.

> Your Honor, we're going to object to any testimony made by Dr. Pile with respect to a case involving or an incident involving the Defendant at sometime prior to the offense for which he's charged . . . as well as the fact that—I think that the Commonwealth has to lay the foundation as to what the Doctor instructed Mr. Smith with respect to his rights to say anything to him.

App. 4.

Judge Carneal overruled the objection, noting that evidence concerning Smith's prior history was relevant and that Dr. Pile had examined Smith at defense counsel's request:

> You, having done this, and Mr. Smith having talked to him, I don't believe that Dr. Pile has any duty to inform him that anything he may say to him may be used for or against him in a court of law, as a police officer does under the *Miranda*.

App. 5.

Dr. Pile was permitted to answer the question.

> A. He explained that he was driving a school bus. That he came close to assaulting a girl. He tore her clothes off, but then thought better of raping her, and did not do so.
>
> Mr. Person: that's all the questions I have.

App. 6.

At the state habeas hearing, Mr. Pugh testified that he would not have called Dr. Pile to testify because he "did not feel his testimony would benefit Mr. Smith" and that he knew that Pile's diagnosis "would have been harmful ." App. 137. He also felt that Dr. Pile's evaluation had been too brief to support the diagnosis. Nonetheless, after the prosecution had asked Dr. Pile about the school bus incident, Pugh asked about his diagnosis:

> Q. Dr. Pile, in your diagnosis, what was your diagnosis of Michael Smith?
>
> A. I felt that he was a sociopathic personality, sexual deviation, rape.

> Q. What is that?
>
> A. A person who—is also described as an antisocial personality. They're all sort of the same type of—of personality disorder. The basically [sic] people who are unsocialized, and they're repeatedly in conflict with the Court. They don't seem to have any capability of—of having loyalty to anybody, to any group or to any social values. Usually, they're rather irresponsible. They seem to feel no guilt, and they don't seem to learn from either experience or punishment. They seem to particularly have no feelings or standards of what's right and what's wrong.

App. 7.

In his testimony at the state habeas hearing, Mr. Pugh was unable to explain why he asked Dr. Pile about his diagnosis. App. 138-39.

The second Commonwealth witness was Dr. James C. Dimitris, forensic psychiatrist at Central State Hospital, who testified that Smith was competent to stand trial and legally sane at the time of the offense. On cross-examination, defense counsel asked Dr. Dimitris for his diagnosis of Smith. During Dr. Dimitris' testimony, two jurors asked him to explain the difference between his diagnosis ("inadequate personality disorder") and Dr. Pile's diagnosis ("sociopathic personality disorder"), referring particularly to the implications for successful treatment. App. 17-21.

The prosecution also called Smith's Parole Officer, Frederick Toepke, who testified about Smith's prior rape conviction, and Investigator Fred Dunford, who again read Smith's confession.

The defense recalled Mr. Toepke to testify that Smith had no criminal record other than the 1973 rape charge, and then called twelve character witnesses and Smith's parents, all of whom gave very brief testimony to the effect that Smith had been a regular churchgoer, a member of the choir, a good bus driver, a conscientious student at Bruton High School, and a good soldier in Vietnam. His parents also testified about life on the family-owned Gospel Spreading Farm.

In its closing argument, the prosecution relied on Dr. Pile's description of the school bus incident, as well as Dr. Pile's

diagnosis, to support its claim that Smith would be a continuing threat to society and that a death sentence was necessary to incapacitate him. App. 31-33.

After receiving the court's instructions, the jury began to deliberate. Two hours later, the jury returned "to request the definition of the term 'life imprisonment' with respect to [the defendant's] eligibility for parole during said life sentence." Transcript 1096. The court declined to answer the question, directing the jurors "to impose such punishment as you consider to be just under the evidence and within the limits stated in the court's instructions" and "not to concern yourselves with what may afterwards happen." Two hours later, the jury returned a death sentence. The jurors found both of the statutory aggravating circumstances—i.e. that "there is a probability that [Smith] would commit criminal acts of violence that would constitute a continuing serious threat to society" and that his "conduct in committing the offense [was] outrageously or wantonly vile, horrible or inhuman, in that it involved torture and aggravated battery to the victim." The jury struck the language "depravity of mind" from the second circumstance. App. 39.

Direct Appeal

Smith's death sentence was affirmed by the Virginia Supreme Court. Defense counsel did not assign as error on direct appeal the admission of Dr. Pile's testimony. Although the issue was discussed in an Amicus Brief filed by the Post-Conviction Assistance Project of the University of Virginia School of Law, the Virginia Supreme Court expressly refused to consider arguments of amicus "not comprehended by the assignments of error." After briefs had been submitted but before argument on the appeal, the Fourth Circuit decided *Gibson* v. *Zahradnick*, 581 F.2d 75, 80 (4th Cir. 1978), overturning the Virginia Supreme Court's 1975 decision in *Gibson* v. *Commonwealth* and holding that "an incriminating statement made during a psychiatric examination cannot be used to prove a defendant's guilt, whether the defendant or the prosecutor requested the examination and whether it was had for the

purpose of determining competency to stand trial or sanity [at the time of the offense]."

At the state habeas hearing, Mr. Pugh testified that he did not assign the admissibility of Dr. Pile's error because he did not think the claim had any merit under Virginia law. App. 143. However, he stated that he had not personally researched the issue, that he was unfamiliar with pertinent decisions of the federal courts, and was unsure whether the law student who had assisted the defense had researched the federal case law. Id.

Collateral Proceedings and the Decision Below

Smith alleged in both his state and federal habeas petitions that Dr. Pile's testimony at the sentencing proceeding was constitutionally inadmissible. Both the state habeas court and the federal district court ruled that the claim had been forfeited, on grounds of procedural default, because Mr. Pugh had failed to raise the issue on direct appeal to the Virginia Supreme Court. Smith has argued that the federal courts should address the merits of the claim, notwithstanding the procedural default, because Pugh's failure to raise the issue on appeal was attributable to ignorance or neglect rather than informed professional deliberation. *See Carrier* v. *Hutto*, 724 F.2d 396 (1983), *aff'd en banc*, 754 F.2d 520, *cert. granted sub nom. Carrier* v. *Sielaff*, 105 S. Ct. 3523 (1985) (interpreting the "cause" requirement of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977)).

In its decision below, the Fourth Circuit chose to address the merits of Smith's claim, assuming without deciding that Smith had demonstrated sufficient "cause" for the procedural default to warrant federal review. On the merits, the Fourth Circuit assumed, without deciding, that Dr. Pile's testimony was constitutionally inadmissible, and that it tainted the jury's finding of future dangerousness, but ruled that the error did not invalidate Smith's death sentence because it did not taint the jury's finding that the offense was "outrageously or wantonly vile, horrible or inhuman . . ." In reaching this conclusion, the court interpreted *Zant* v. *Stephens*, 462 U.S. 862 (1983), to stand for

the general proposition that a death sentence is constitutionally valid so long as it is predicated on at least one valid aggravating circumstance.

SUMMARY OF ARGUMENT

An adequate mental evaluation by a qualified psychiatrist or psychologist is often "crucial to the defendant's ability to marshal a defense." *Ake* v. *Oklahoma*, ___ U.S. ___, 84 L.Ed.2d 53, 64 (1985). That evaluation will only be reliable if it can be a full and probing inquiry into the circumstances of the offense and the defendant's previous behavioral history; if the defendant is not completely open and candid with the examiner, the evalution may be worthless. If the defendant is not free to discuss the offense, or his thoughts and feelings at the time of the offense, or any prior offenses, out of fear that the information could be used by the prosecution to convict or execute him, he would sacrifice his opportunity to explore and present available claims in exculpation or mitigation. On the other hand, a defendant who yields his innermost thoughts and feelings to the clinical inquiry, and then finds his disclosures used to prove the prosecution's case, has become the "deluded instrument" of his own conviction or execution.

Most state and federal courts have long recognized that it is fundamentally unfair to require a criminal defendant to choose between his right to clinical evaluation and assistance and his privilege against self-incrimination. The only issue on which courts have disagreed is the path to this conclusion. Some courts have rested the ban on a Sixth Amendment foundation, viewing the relationship between the examiner and the defendant as an extension of the attorney-client relationship, and the communications between the client and the examiner as protected by the attorney-client privilege. Other courts have ruled that affirmative prosecutorial use of the defendant's disclosures violates the Fifth Amendment. Finally, other courts have hesitated to tie the exclusionary rule to the Fifth Amendment because of the implication that "voluntary" statements would be admissible; instead these courts have rooted their reasoning directly in the Due Process Clause, holding that it is fundamen-

tally unfair to put the defendant to a choice between his Sixth Amendment interest in exploring and presenting clinically-based defenses and his Fifth Amendment interest in avoiding self-incrimination.

The choice of the underlying constitutional theory may have implications for the resolution of issues not before the Court in this case, but for purposes of resolving Smith's claim, all of these theories lead to the same result: the prosecution may not make affirmative use of the defendant's statements to a psychiatrist to prove the elements of its case on "guilt" or in aggravation of sentence.

Most of the decisions barring affirmative use of the defendant's disclosures to prove guilt predate the contemporary generation of capital sentencing statutes and do not mention capital sentencing proceedings. However, the principles upon which they are based are clearly applicable to the sentencing phase of a capital case. In these proceedings, the prosecution's proof of aggravating circumstances is the functional equivalent of its proof of the elements of the crime at the guilt stage (*Bullington* v. *Missouri*, 451 U.S. 430 (1981)); and capital defendants need expert assistance to explore and develop claims in mitigation (*Ake* v. *Oklahoma*, ____ U.S. ____, 84 L.Ed.2d 53 (1985)). This Court should hold that statements or other disclosures made by the defendant during a defense-requested mental evaluation, and opinions based on those statements or disclosures, are constitutionally inadmissible when offered affirmatively by the prosecution to prove the elements of the offense or to establish the statutory predicate for a death sentence. On the facts of this case, Dr. Pile's testimony was clearly inadmissible.

Dr. Pile's testimony was not harmless beyond a reasonable doubt under *Chapman* v. *California*, 386 U.S. 18 (1967). To the contrary, there is a significant likelihood that the constitutionally inadmissible evidence contributed to the jury's finding of the "future dangerousness" aggravating circumstance and that the dangerousness factor played a determinative role in the jury's decision to impose the death penalty.

The Fourth Circuit apparently understood this Court's decision in *Zant* v. *Stephens*, 462 U.S. 862 (1983), to stand for the sweeping proposition that a demonstrably prejudicial constitutional error in the capital sentencing process may be ignored as long as the error does not taint every aggravating circumstance. This interpretation rests on a fundamental misunderstanding of *Zant* v. *Stephens*. As the Court emphasized in *Zant* v. *Stephens*, "[a]lthough not every imperfection in the deliberative process is sufficent, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." 462 U.S. at 885. Smith has demonstrated a clear error of constitutional magnitude. This Court should set aside his death sentence.

ARGUMENT

I.

DR. PILE'S TESTIMONY ABOUT INCRIMINATING STATEMENTS MADE BY SMITH DURING A PRETRIAL MENTAL EVALUATION REQUESTED BY THE DEFENSE, WHEN INTRODUCED BY THE PROSECUTION FOR THE SOLE PURPOSE OF PROVING ITS CASE-IN-AGGRAVATION, WAS CONSTITUTIONALLY INADMISSIBLE.

In *Estelle* v. *Smith*, 451 U.S. 454 (1981), this Court addressed, for the first time, the constitutional principles governing mental evaluations in criminal cases. In *Smith*, what appeared on its face to be a "neutral" evaluation of the defendant's competency to stand trial was transformed into a process for enabling the prosecution to meet its burden of proving statutory aggravating circumstances at the capital sentencing trial.[1] Although Dr. Grigson was ordered to conduct a "neutral competency examination," the psychiatrist became an agent of the state when he "testified for the prosecution at the penalty phase on the crucial issue of [Smith's] future dangerousness."

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[1] Texas law explicitly prohibited affirmative prosecutorial use of disclosures made during the competency exam to prove the defendant's guilt. 451 U.S. at 463 n.6.

451 U.S. at 467. This practice obviously implicated the defendant's interest in not being the "deluded instrument of his own execution," 451 U.S. at 462, and unfairly distorted the balance of the adversary system. By holding that counsel must be notified, and the defendant warned, before any such evaluation is conducted, the Court substantially reduced the likelihood that a prosecutor will be able to use a pretrial mental evaluation as an investigative tool in a case in which the defense has not sought an evaluation.[2]

However, the Texas practice at issue in *Estelle* v. *Smith* was so unusual that the Court's decision has little direct bearing on the great majority of pretrial mental evaluations. See generally, White, "The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases," 74 *J. Crim. L. & Criminology* 943 (1983); Slobogin, "Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation," 31 *Emory L.J.* 31 (1982). Most such evaluations are either sought by the defense or are sought by the prosecution in response to notice given by the defense of its intention to plead insanity or otherwise put mental condition in issue. Resolution of Michael Smith's case requires the Court to clarify the principles to be applied in at least the first of these two contexts.

Dr. Pile was ordered by the Court to evaluate Smith at the request of defense counsel to help him explore claims in exculpation or mitigation based on Smith's mental condition. Over defense objection, the prosecution called Dr. Pile to testify at the sentencing phase about an incriminating statement made by Smith during the evaluation. The defense did not plan to call Dr. Pile to testify and the testimony elicited by the prosecution was not offered to rebut any claim raised by the defense in mitigation.

When Judge Carneal overruled the defense objection to Dr. Pile's testimony, he was presumably relying on *Gibson* v. *Commonwealth*, 216 Va. 412, 219 S.E.2d 845 (1975), *cert. denied*,

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[2] In most jurisdictions, as in Texas, information disclosed during a competency evaluation may be used only in resolving the competency issue, and specifically may not be used on the issue of guilt. See, e.g., 18 U.S.C. § 4244.

425 U.S. 994 (1976). Under *Gibson*, the prosecution was permitted to make affirmative use of incriminating statements made by the defendant during a court-ordered psychiatric examination to prove the elements of the crime.[3] The Virginia Supreme Court held: "[W]hether an accused consents or is required to submit to a psychiatric examination, if during the examination he is *not compelled* to answer questions concerning the offense with which he is charged, there is no violation of his right against self-incrimination." 216 Va. at 414 (emphasis in original). It followed from *Gibson*, of course, that Dr. Pile's testimony about Smith's incriminating admissions could be used at the sentencing phase of his trial.

The issue before this Court is whether *Gibson* v. *Commonwealth* states a constitutionally permissible rule. In *Gibson* v. *Zahradnick*, 581 F.2d 75 (4th Cir. 1979), *cert. denied*, 439 U.S. 996 (1978), the Fourth Circuit ruled that it did not, holding that the prosecution may not make affirmative use of information disclosed during *any* pretrial mental evaluation to prove the defendant's "guilt."[4] In so holding, the Fourth Circuit subscribed to the prevailing constitutional understanding in the federal courts and in most state courts that have addressed the constitutional issue. Although the courts have employed dif-

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[3] Gibson had been charged with murdering his estranged wife and her father. After his arrest, and at the request of his counsel, he was committed to Central State Hospital for evaluation of his competency to stand trial and his sanity at the time of the offense. At his trial, the prosecution called the examining psychiatrist, Dr. Dimitris, to testify that Gibson had admitted the killings during the examination. (He testified that Gibson had told him he remembered going to his father-in-law's house and shooting him but that he did not remember anything thereafter.)

[4] *Gibson* v. *Zahradnick* was decided after Smith's case had been briefed but before it had been argued on direct appeal. The Fourth Circuit held that the admission of Dr. Dimitris' testimony about Gibson's incriminating statements violated the Fifth Amendment:

> An incriminating statement made during a psychiatric examination cannot be used to prove a defendant's guilt, whether the defendant or the prosecutor requested the examination and whether it was had for the purpose of determining competence to stand trial or sanity [at the time of the offense].

581 F.2d at 80.

ferent constitutional theories, they agree on the fundamental proposition that the prosecution is not permitted to make affirmative use[5] of evidence derived from a pretrial mental evaluation sought by the defense.[6]

A. Unless Affirmative Prosecutorial Use Of Information Derived From A Defense-Requested Mental Evaluation Is Proscribed, The Defendant Is Forced To Choose Between His Privilege Against Self-Incrimination And His Constitutional Right To An Adequate Mental Evaluation.

In *Ake* v. *Oklahoma*, ___ U.S. ___, 84 L.Ed. 2d 53, 64 (1985), this Court recognized that access to an adequate mental evaluation and expert assistance are often "crucial to the defendant's ability to marshal a defense" in cases where "the law makes the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer."

In capital cases, consideration of the defendant's mental or emotional condition at the time of the offense, as well as his personal history and character, is a constitutionally indispensable feature of the sentencing process. See, e.g., *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982); *cf. Godfrey* v. *Georgia*, 446 U.S. 420, 433 (1980); Most capital sentencing statutes specify, as mitigating circumstances, factors relating to the offender's diminished responsibility, see, e.g., *Va. Code Ann.*

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[5] The term "affirmative use" is being employed as a shorthand reference to the use of evidence to prove those elements of the prosecution's case which are logically independent of claims raised by the defense. It is not being used as a synonym for the prosecution's burden of proof because the prosecution may bear the burden of persuasion on claims which the defense is required to raise, such as the insanity defense. Similarly, the defendant may introduce evidence regarding his mental condition to disprove mens rea; in this situation, the prosecution's use of evidence derived from a mental evaluation would be used "responsively" even though the prosecution still bears the burden of proving mens rea.

[6] Constitutional rulings on the issue have rarely been required because affirmative prosecutorial use of information disclosed during a pretrial mental evaluation is proscribed by statute, court rule, or case law in the federal courts and in at least 38 states. See Argument I D, infra.

§ 19.2-264.4 (1983 Repl. Vol.), and the defendant's case in mitigation often rests on a foundation of clinical[7] testimony. As a result, access to a comprehensive clinical evaluation is virtually a necessity for a defendant charged with a capital crime.

In *Ake*, this Court held that upon a proper showing of need, the state must assure an indigent defendant "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense." 84 L.Ed. 2d at 66.[8] The underlying question in this case is whether the evaluation and assistance envisioned in *Ake* is possible if a state permits affirmative prosecutorial use of incriminating disclosures made by the defendant during the evaluation.

An adequate evaluation of a defendant's mental condition at the time of the offense ("reconstructive" evaluation) requires the clinician to conduct a probing interview focusing on the defendant's "thoughts, feelings and actions before, during and after the time of the crime." J. MacDonald, *Psychiatry and the Criminal* 47 (1958). See also S. Halleck, *Law in the Practice of Psychiatry: A Handbook for Clinicians* 220 (1980); T. Gutheil and P. Appelbaum, *Clinical Handbook of Psychiatry and the Law* 300 (1982). See also the testimony of Drs. Showalter and Dimitris in the state habeas proceeding in Smith's case. App. 99, 116-117. The utility of the clinical interview depends

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[7] "Clinical" is used as a shorthand reference to the broad category of evaluations and opinions relating to the defendant's mental condition or behavior within the specialized knowledge of psychiatrists, psychologists and other mental health and mental retardation professionals.

[8] Although this Court linked its holding in *Ake* to the Due Process Clause rather than to the Sixth Amendment, it is clear that expert evaluation and assistance is sometimes necessary to provide constitutionally adequate assistance of counsel. See, e.g., *United States* v. *Alvarez*, 519 F.2d 1036 (3d Cir. 1975); *Edney* v. *Smith*, 425 F.Supp. 1038 (E.D.N.Y. 1976). In fact, where expert knowledge is required to enable the attorney to evaluate the defendant's case and prepare a defense, the failure to request expert assistance may constitute ineffective assistance of counsel. See, e.g., *Wood* v. *Zahradnick*, 578 F.2d 980 (4th Cir. 1980); *United States* v. *Edwards*, 488 F.2d 1154 (5th Cir. 1974); *Loe* v. *United States*, 545 F.Supp. 667 (E.D. Va. 1982); *Brennan* v. *Blankenship*, 472 F.Supp. 149 (W.D. Va. 1979).

strongly on the subject's willingness to say what comes to mind, without screening or filtering his feelings and thoughts.[9]

The relation between full disclosure and informed clinical opinion was succinctly emphasized by the Fourth Circuit in *Gibson* v. *Zahradnick*, 581 F.2d 75, 79 (4th Cir. 1978):

> . . . The most dependable and reliable testimony by psychiatrists would be unobtainable in many cases unless they were free to inquire into the prior aberrant conduct of the defendant, including his participation in the criminal activity with which he is charged. A person's mental condition, his motivation and his delusions would be undiscoverable in most instances unless the psychiatrist knows what the defendant has done and can engage in a penetrating discussion with the person about it. . . .

Accord, *United States* v. *Leonard*, 609 F.2d 1163, 1165-66 (5th Cir. 1980); *Collins* v. *Auger*, 577 F.2d 1107, 1110 (8th Cir. 1978), *aff'g* 428 F. Supp. 1079, 1083 (S.D. Iowa 1977); *United States* v. *Cohen*, 530 F.2d 43, 47 (5th Cir. 1976); *United States* v. *Alvarez*, 519 F.2d 1036 (3d Cir. 1975); *United States* v. *Bohle*, 445 F.2d 54, 67 (7th Cir. 1971); *United States* v. *Albright*, 388 F.2d 719, 726 (4th Cir. 1968). Thus, any impediment to full and free disclosure poses a threat to the utility and reliability of the evaluation.

If the prosecution were permitted to make unrestricted use of disclosures made during a pretrial mental evaluation, a

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[9] It is generally agreed that a personal interview is necessary to provide an adequate clinical predicate for the kinds of judgments contemplated in criminal trials. See ABA Criminal Justice Mental Health Standards, Std. 7-3.11 and accompanying commentary. Although some courts continue to admit opinion testimony based only on hypothetical questions or courtroom observations, and such testimony is constitutionally permissible, *Barefoot* v. *Estelle*, 463 U.S. 880 (1983), this practice is discouraged by the prevailing opinion in the mental health disciplines. See Diamond and Louisell, "The Psychiatrist as an Expert Witness: Some Ruminations and Speculations," 63 *Mich. L. Rev.* 1325, 1347 (1965); *United States* v. *Albright*, 388 F.2d 719, 725 (4th Cir. 1968) ("Medical Science . . . deems [courtroom observations and hypothetical questions] poor and unsatisfactory substitutes for testimony based upon prolonged and intimate interviews between the psychiatrist and the defendant.")

defendant would be put to a choice between his right under *Ake* to explore defenses based on mental condition and his Fifth Amendment privilege against self-incrimination. Indeed, the effect of the Virginia rule announced in *Gibson* v. *Commonwealth* is to condition the indigent defendant's access to a mental evaluation on a wholesale surrender of his Fifth Amendment privilege.[10] It is fundamentally unfair to require such a choice. See, e.g., *Gibson* v. *Zahradnick*, *supra* at 80 (4th Cir. 1978); *Collins* v. *Auger*, 577 F.2d at 1109-10 (8th Cir. 1978).

In reaching this conclusion, courts have relied on this Court's decision in *Simmons* v. *United States*, 390 U.S. 377 (1968). *Simmons* is directly on point. In that case, a defendant filed a pretrial suppression motion. To establish his standing to invoke the protections of the Fourth Amendment, he testified at the suppression hearing that the suitcase in question belonged to him. The District Court denied the motion to suppress. At the ensuing trial, the defendant's testimony at the suppression hearing was admitted against him. This Court reversed the conviction. In an opinion delivered by Justice Harlan, the Court held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Id.* at 394.

Justice Harlan acknowledged that the defendant's testimony at the suppression hearing, "as an abstract matter," could be said to be "voluntary," and that "testimony is not always invol-

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[10] As discussed in Argument I D, *infra*, many states insulate disclosures to defense-retained experts from disclosure to, or use by, the prosecution by bringing them within the attorney-client privilege. If a state were to afford such protection to defendants financially able to retain experts, while failing to afford such protection to indigent defendants whose experts are appointed by the court, this differential treatment would deny the indigent defendant equal protection of the law. See *Collins* v. *Auger*, 428 F.Supp. 1080, 1084 (S.D. Iowa 1977). In Virginia, however, it is not clear whether disclosures to defense-retained experts are protected by the attorney-client privilege; the issue does not appear to have been litigated.

untary as a matter of law simply because it is given to obtain a benefit." He continued:

> However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which this "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case, [the defendant] was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.

Id. See also *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 807-08 (1977) (person cannot be required to choose between First Amendment right of association and Fifth Amendment privilege against self-incrimination).[11]

The tension between the defendant's Fifth Amendment right and his right to an adequate mental evaluation presents a compelling basis for applying the principle enunciated in *Simons* v. *United States*. It is true, of course, that the *Sim-*

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[11] It is possible, in theory, that the government may make mental evaluations available in a broader range of situations than the Constitution would be construed to require. For example, the state may make the evaluation available simply upon the attorney's request rather than requiring a showing that the defendant's mental condition is likely to be a "significant factor" in the case. See *Ake* v. *Oklahoma*, 84 L.Ed.2d at 66. However, even in these situations, the state cannot condition the availability of such an important benefit on the surrender of a constitutional privilege. *Cf. Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963) ("To condition the availability of [unemployment] benefits upon [a person's] willingness to violate a cardinal principle of his religious faith effectively penalizes the free exercise of his constitutional liberties"); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973) (state cannot condition public employment, government contracts, or bar membership on waiver of privilege against self-incrimination with respect to alleged misconduct connected with the activities.) The point is primarily of theoretical interest in capital cases such as *Smith* because virtually every capital defendant will be able to demonstrate that his mental condition is relevant to possible claims in mitigation and therefore that he is entitled to a clinical evaluation and assistance under *Ake*.

mons argument is susceptible to formalistic application, focusing attention on the mere "*fact* of a choice rather than the *nature* of a choice" and thereby obscuring "the considerations that determine whether a given choice is constitutionally acceptable." Westen, "Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another," 66 *Iowa L. Rev.* 741, 745 (1981). However, the choice to which the defendant is put under the rule of *Gibson* v. *Commonwealth* is a demonstrably unfair choice because it eviscerates the defendant's legitimate Fifth Amendment interests in a way unjustified by the needs of the adversary process.

The unfairness of *Gibson* v. *Commonwealth* is highlighted by comparing the choice required of a defendant who seeks a mental evaluation with the choice required of a defendant who is required to submit to a prosecution-requested mental examination after giving notice of his intent to place his mental condition in issue. It has been argued that a defendant required to submit to a compulsory mental examination is forced to surrender his Fifth Amendment privilege as the price for exercising his right to raise the insanity defense or other defensive claims based on mental condition. Most courts have rejected this argument, holding that the defendant may fairly be required to surrender his Fifth Amendment interests if he chooses to put his mental condition in issue. See *Estelle* v. *Smith*, 451 U.S. at 465-66.

Almost without exception, however, courts that have upheld the constitutionality of compulsory examinations have also limited the adverse impact on the defendant's Fifth Amendment interests by holding that the prosecution may not make affirmative use of the defendant's disclosures to prove the elements of its case on "guilt"; as usually formulated, the rule permits the prosecution to use evidence derived from the evaluation only to rebut claims raised by the defendant concerning his mental condition.[12] Such a rule is necessary to maintain a "fair state-

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[12] See, e.g., *Phelan* v. *State*, 273 Ind. 542, 406 N.E.2d 237 (1980); *Noyes* v. *State*, 516 P.2d 1368 (Okla. 1973); *State* v. *Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965). See generally Model Penal Code and Commentaries, § 4.09, pages 265-70 (1985).

Before the adoption of Rule 12.2(c) of the Federal Rules of Criminal

individual balance" in the administration of the penal law, the policy underlying the Fifth Amendment. *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55 (1964).

The effort to achieve a fair balance in the adversary process may justify rules requiring the defendant to cooperate with the state's examiners as a condition of introducing expert testimony of his own, and permitting the prosecution to use evidence derived from the evaluation to counter claims raised by the defendant; but the need to satisfy the prosecution's legitimate interests does not justify a total obliteration of the defendant's Fifth Amendment interests, and in particular, does not justify affirmative prosecutorial use of evidence derived from the examination. It should also be emphasized that a ban on affirmative use of evidence derived from the evaluation does not compromise any legitimate interests of the prosecution; it deprives the state of no evidence that it would have had if the defendant had not sought the evaluation in the first place.

The only alternative remedy that has been suggested is to require the examiner to warn the defendant that his disclosures can be used against him. Such warnings could decrease the likelihood that the defendant would surrender his privilege unwittingly,[13] but the defendant and his counsel are

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Procedure, which codifies this proscription, almost every federal circuit had reached this conclusion on constitutional grounds. See, e.g., *United States* v. *Albright*, 388 F.2d 719, 725-26 (4th Cir. 1968); *United States* v. *Bohle*, 445 F.2d 54, 66-67 (7th Cir. 1971); *United States* v. *Bennett*, 460 F.2d 872 (D.C. Cir. 1972); *United States* v. *Cohen*, 530 F.2d 43, 47-48 (5th Cir. 1976); *United States* v. *Reifsteck*, 535 F.2d 1030, 1034 (8th Cir. 1976). *Cf. Pope* v. *United States*, 372 F.2d 710, 720 (8th Cir. 1967); *United States* v. *Baird*, 414 F.2d 700, 706-710 (2d Cir. 1969).

[13] There is reason to doubt that "psychiatric *Miranda* warnings" are sufficient to assure rational decisions by the defendants themselves. The climate of a clinical interview tends to promote disclosure, even in the face of warnings. See, e.g., Read, "Can a Psychiatric Miranda Work? A California Perspective," 14 *Rutgers L.J.* 431 (1983). Indeed, only well-informed counsel would be in a position to make a carefully considered choice concerning the advisability of disclosures; the decision would require the exercise of counsel's judgment regarding the strength of the prosecution's case and the prospect that a clinically-based defensive claim could be successfully raised. The

still left with the necessity of choosing between constitutional rights. See, e.g., *Collins* v. *Auger*, 577 F.2d 1107, 1109-10 (8th Cir. 1978) ("If the giving of a *Miranda* warning satisfied the requirements of the Fifth Amendment and the Fourteenth Amendment and made the defendant's incriminating admissions admissible, the defendant would be placed in a situation where he must sacrifice one constitutional right to claim another") (quoting *Collins* v. *Auger*, 428 F. Supp. 1079, 1083 (S.D. Iowa 1977)); *Gibson* v. *Zahradnick*, 581 F.2d 75, 79 n.1 (4th Cir. 1978). If this Court were to hold that the Constitution is satisfied if the defendant is warned that his statements can be used against him, the tension between the right to develop evidence in mitigation and the right to remain silent would remain unresolved.[14]

The constitutional logic leading to the conclusion that the prosecution may not make affirmative use of disclosures made by the defendant during a pretrial mental evaluation seems irrefutable, and all federal courts that have confronted the issue have reached this conclusion. The only question upon which they have disagreed is the constitutional provision upon which to predicate the holding.

The Fourth Circuit rested its holding in *Gibson* on the Fifth Amendment. *Accord*, *United States* v. *Leonard*, 609 F.2d 1163

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problem for counsel is that the decision to seek a mental evaluation ordinarily must be made before sufficient information is available to make an informed judgment about the prosecution's case; moreover, the assistance of an expert is necessary, in most cases, to enable counsel to make an informed decision about the potential utility of the clinical claims.

[14] As was noted at the outset of the Argument, the Fifth Amendment analysis of *Estelle* v. *Smith*, 451 U.S. 454 (1981), is not directly applicable to cases in which the defense seeks a mental evaluation. Although a warning may be sufficient to protect the defendant's Fifth Amendment interests in the context presented in *Estelle* v. *Smith*, it would not be a satisfactory solution in cases in which the defendant seeks the evaluation to explore possible avenues of defense.

Even if the Court were to hold that a defendant who requests a pretrial mental evaluation waives his privilege against self-incrimination by speaking to the examiner, *Estelle* v. *Smith* holds that such a waiver can be effected only if the examiner gives the proper warning. Because Dr. Pile did not warn Smith that his statements could be used against him, Dr. Pile's testimony was constitutionally inadmissible even on this narrow ground.

(5th Cir. 1980); *In re Spencer*, 63 Cal. 2d 400, 406 P.2d 33, 46 Cal. Rptr. 753 (1965). Other courts have reached the same conclusion, relying upon the same rationale, but have traveled down slightly different paths of constitutional logic. In *Collins Auger*, 577 F.2d 1107, 1109 (8th Cir. 1978), the Eighth Circuit held that it is "fundamentally unfair to use defendant's incriminating admissions to a psychiatrist during a psychiatric examination as part of the prosecution's case to establish his guilt." In reaching this conclusion the court adopted the reasoning of Judge Stuart's thoughtful opinion in *Collins* v. *Auger*, 428 F.Supp. 1079 (S.D. Iowa 1977). See also *State* v. *Craney*, 347 N.W.2d 376 (Iowa 1975). Finally, in *United States* v. *Alvarez*, 519 F.2d 1036 (3d Cir. 1975), the Third Circuit took a broader view of the issue, holding that disclosures made during a defense-requested mental evaluation are constitutionally privileged under the Sixth Amendment. Under this approach, the relationship between the expert and the defendant is viewed as an extension of the attorney-client relationship, and prosecutorial use of evidence derived from the evaluation is viewed as a violation of the attorney-client privilege, which is itself viewed as having its roots in the Sixth Amendment. See also *Edney* v. *Smith*, 425 F. Supp. 1038 (E.D.N.Y. 1976).

The choice of the underlying constitutional theory may have implications for the resolution of issues not before the Court in this case, such as whether the prosecution may call an expert who conducted an examination at the request of the defense (i) to express an opinion different from the opinion expressed by another expert witness called by the defense or (ii) to impeach the defendant's own testimony.[15] However, for purposes of

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[15] On the question whether the prosecution may call the expert to testify, in rebuttal, on mental condition, *compare United States* v. *Alvarez*, 519 F.2d 1036, 1046 (3d Cir. 1975); *State* v. *Pratt*, 284 Md. 516, 398 A.2d 421 (1979); and *Houston* v. *State*, 602 P.2d 784 (Alaska, 1979) *with Edney* v. *Smith*, 425 F.Supp. 1038 (E.D. N.Y. 1976), *aff'd*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977). The issue is discussed at length in the opinions in *Noggle* v. *Marshall*, 706 F.2d 1408 (6th Cir. 1983). See generally, Saltzburg, "Privileges and Professionals: Lawyers and Psychiatrists," 66 *Va. L. Rev.* 597 (1980).

On the question of use of the expert testimony for purposes of impeachment, *compare United States* v. *Leonard*, 609 F.2d 1163 (5th Cir. 1980), *with United States* v. *Castenada*, 535 F.2d 605 (7th Cir.), *cert. denied*, 434 U.S. 847 (1977).

resolving Smith's case, all of these theories lead to the same result: the prosecution may not make affirmative use of the defendant's disclosures, or opinions based on those disclosures, to prove the elements of its case.

B. The Settled Principle That The Prosecution May Not Make Affirmative Use Of Evidence Derived From A Pretrial Mental Evaluation To Prove The Defendant's "Guilt" Also Applies To Proof Of Aggravating Circumstances At The Sentencing Phase Of A Capital Case.

Gibson v. *Zahradnick*, *United States* v. *Alvarez* and *Collins* v. *Auger* and most of the other cases cited above predate the contemporary generation of capital sentencing statutes and do not mention capital sentencing proceedings. However, the principles upon which they are based are clearly applicable to the sentencing phase of a capital case. First, this Court held in *Estelle* v. *Smith*, 451 U.S. 454 (1981), that the Fifth Amendment is applicable in capital sentencing proceedings: "We can discern no basis to distinguish between the guilt and penalty phases of [a] capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." 451 U.S. at 462-63. Second, in a capital sentencing proceeding, the prosecution's proof of its case-in-aggravation is the functional equivalent of its proof of the elements of a criminal offense at the guilt stage. *Bullington* v. *Missouri*, 451 U.S. 430 (1981); *Estelle* v. *Smith*, 451 U.S. at 466. Finally, a capital defendant requires access to a psychiatric evaluation and assessment because his case in mitigation will typically rest on a foundation of psychiatric testimony.

In Virginia, in order to establish the evidentiary predicate for the death penalty, the Commonwealth has the burden of proving either of the two aggravating circumstances (future dangerousness or "vileness") beyond a reasonable doubt. Accordingly, it follows from the constitutional principle recognized in *Gibson*, *Alvarez*, and *Collins* that the prosecution may not use against a defendant, as part of its case-in-aggravation in a capital sentencing proceeding, any incriminating statements made by the defendant during the course of a psychiatric evaluation; psychiatric evidence obtained during such an eval-

uation is admissible only if the defendant puts his mental condition in issue to prove mitigating circumstances, and then only on the issues raised, not on any unrelated issues in aggravation.[16] *Accord Battie* v. *Estelle*, 655 F.2d 692, 700 (5th Cir. 1981) (holding that a psychologist's testimony diagnosing defendant as a sociopath likely to follow a violent career was constitutionally inadmissible "where the defense neither requested an examination on future dangerousness nor introduced psychiatric or psychological testimony on that issue").[17] Applying these generally accepted principles, Dr. Pile's testimony was clearly inadmissible.

C. The Permissibility Of Affirmative Prosecutorial Use Of A Defendant's Disclosures During A Pretrial Mental Evaluation Should Not Depend, As The Commonwealth Contends, On Who Requested The Evaluation.

In its briefing and argument before the Fourth Circuit, the Commonwealth conceded that the Fifth Amendment pre-

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[16] In some cases, the issues may be so intertwined that testimony concerning a mitigating circumstance may also tend to prove an aggravating circumstance, or may open the door to such testimony, but the settled constitutional understanding is that the decision to open the door to psychiatric testimony, in light of its evidentiary risks, should be controlled by the defense. Be that as it may, no such double-edged sword problem was presented in Smith's case. Dr. Pile's testimony was used affirmatively by the prosecution and was not relevant to any claim in mitigation raised by the defense.

[17] In *Battie*, the Fifth Circuit also pointed out that the examiner, who conducted the evaluation upon defense request, "did not advise Battie of his fifth amendment privilege." Neither did Dr. Pile in Smith's case. However, for the reasons discussed above, this is not the critical variable. Whether or not the defendant is warned, his Fifth Amendment right cannot be "waived" by talking to the psychiatrist, but only by putting his mental condition in issue at trial.

The Commonwealth had also claimed in *Gibson* that the defendant's disclosures had been voluntary. Judge Haynesworth noted in response that Gibson had not been adequately warned in any event but went on to emphasize that such a warning would not have vitiated the constitutional defect in the process: "We do not mean to imply that if a defendant were given a full *Miranda* warning, an incriminating statement made by the defendant during the ensuing psychiatric examination could be used at trial to prove the defendant's guilt." *Id.* at 79, n.1.

cludes the prosecution from introducing, as part of its case-in-chief (to prove a defendant's guilt or to prove aggravating circumstances in a capital case) statements elicited from the defendant during a psychiatric evaluation conducted *for the state*. However, the Commonwealth argued that the prosecution is *not* constitutionally precluded from introducing the same incriminating evidence if the evaluation was conducted *at the request of the defense*, even if the defendant has not put his mental condition in issue. Apparently, the Commonwealth's theory is either that a defendant waives his Fifth Amendment rights by requesting a psychiatric evaluation and talking to the examiner, or that the Fifth Amendment is not implicated at all when an evaluation is conducted for the defense. The Commonwealth reasoned that a defendant who makes incriminating disclosures to an examining psychiatrist has simply "confided to a friend" and "must suffer the consequences if the friend later betrays the confidence" (quoting *Conquest* v. *Mitchell*, 618 F.2d 1053, 1056-57 (4th Cir. 1980) (Haynesworth, C.J., concurring).

This reasoning is fatally flawed. First, a mental health professional conducting a pretrial forensic examination for the defense in a criminal case is not merely a friend in whom the defendant has chosen to confide. Instead, the examiner is serving an essential constitutional function in assisting the defendant to explore the availability of clinical evidence in exculpation or mitigation. *Ake* v. *Oklahoma*, ___ U.S. ___, 84 L.Ed. 2d 53 (1985). Second, Smith's privilege against self-incrimination was clearly at stake in the evaluation by Dr. Pile. The court order directed Dr. Pile to send a copy of the report to the prosecution, and *Gibson* v. *Commonwealth* permitted the prosecution to make affirmative use of evidence derived from the evaluation. Under these circumstances, as in *Estelle* v. *Smith*, "[W]hen Dr. [Pile] went beyond simply reporting to the court on the issue of [Smith's mental condition at the time of the offense] and testified for the prosecution at the penalty phase on the crucial issue of [Smith's] future dangerousness, his role changed and became essentially like that of an agent of the State. . . ." 451 U.S. at 467.

Estelle v. *Smith* stands for the proposition that the Fifth Amendment is implicated in any pretrial mental evaluation, regardless of who requested it, if evidence derived from the evaluation can be used affirmatively by the prosecution. The rule of *Gibson* v. *Commonwealth* is no less offensive to the Fifth Amendment and to elemental notions of fairness in Smith's case than it would have been if he had been evaluated at the request of the prosecution. This is what the Fourth Circuit had so explicitly recognized in *Gibson* v. *Zahradnick*, *supra*, at 80:

> [A]n incriminating statement made during a psychiatric examination cannot be used to prove a defendant's guilt, *whether the defendant or the prosecutor requested the examination*, and whether it was had for the purpose of determining competency to stand trial or sanity [at the time of the offense]. [Emphasis added]

Battie v. *Estelle*, 655 F.2d 692 (5th Cir. 1981), is virtually identical to Smith's case in this respect. Upon defense motion, the trial court appointed a psychiatrist and psychologist to determine whether Battie was competent to stand trial and whether he was insane at the time of the crime. The psychologist submitted his report to the psychiatrist, who in turn submitted it, together with his own report, to the trial judge. The reports were then sent to the prosecution and defense. The psychiatrist was not called to testify by either party; however, the psychologist was called by the prosecution at the sentencing phase of Battie's trial to testify that Battie was a sociopath who would continue to pose a danger to society. The Fifth Circuit held that the testimony was constitutionally inadmissible. First, the Court noted, Battie was in the state's custody and the psychologist "had been appointed by the state trial court to conduct the examination and therefore the custodial interrogation was conducted by an agent of the state." *Id.* at 699-700. Second, the Court concluded that Battie had not waived his Fifth Amendment privilege "by requesting a psychiatric examination to determine his competency to stand trial and his sanity at the time of the commission of the crime." *Id.* at 700-701. The court then rejected the state's contention that "a

defendant's mere submission to a psychiatric or psychological examination constituted a waiver of the fifth amendment privilege." *Id.* at 702.[18]

Gibson and *Battie* recognize that defense-requested mental evaluations have Fifth Amendment implications. However, it is important to emphasize that neither of the evaluations conducted in these cases was structured within the framework of the attorney-client relationship. As in Michael Smith's case, the examiners' reports were sent to the prosecution as well as the defense, and the experts were not serving as agents of the defense within the protective umbrella of the attorney-client privilege.

This practice is likely to be abandoned in light of this Court's decision in *Ake* v. *Oklahoma*. It seems clear that the evaluation to which an indigent defendant is constitutionally entitled under *Ake* must be conducted within the framework of the attorney-client relationship and that any disclosures made by defendant to the expert should be insulated from disclosure to, or use by, the prosecution to the same extent as would be the case if the expert had been retained by a defendant financially able to defend himself without state assistance.

If mental evaluations for indigent defendants are structured to bring them within the framework of the attorney-client relationship, affirmative prosecutorial use of disclosures made by a defendant during such an evaluation is unlikely to be

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[18] The Fifth Circuit concluded that *Battie* was indistinguishable from *Estelle* v. *Smith*, notwithstanding the fact that Battie had requested the evaluation. Accordingly, because Battie had not been warned that his disclosures would be used against him, the Court set aside the sentence under *Estelle* v. *Smith*. However, the outcome in *Battie* does not properly turn on whether or not warnings were given. Battie was constitutionally entitled to a psychiatric evaluation; he did not waive his Fifth Amendment rights by requesting or participating in the evaluation; and the prosecution's use of the disclosures would have been constitutionally permissible only if they had been relevant to an issue raised by the defense. Because Battie did not introduce psychiatric or psychological testimony to disprove dangerousness, prosecutorial use of the psychologist's testimony was constitutionally impermissible.

permitted in most states due to the protections afforded by various evidentiary privileges. (See Argument I D.) If a state were to permit such evidence to be used by the prosecution, however, this Court should not hesitate to hold, for the reasons discussed in this brief, that the evidence is constitutionally inadmissible.

In its brief in the Fourth Circuit, the Commonwealth relied on *Smith* v. *Wainwright*, 741 F.2d 1248 (11th Cir. 1984). In *Smith* v. *Wainwright*, the prosecution called a psychiatrist originally retained by the defense to testify that the defendant had claimed amnesia concerning the crime. The testimony was introduced to contradict Smith's alibi that he did not commit the murder but was at home "sleeping off a drunk." The Eleventh Circuit ruled that the protections of *Estelle* v. *Smith*, 451 U.S. 454 (1981), "do not apply unless the psychiatrist is 'essentially an agent of the state . . .'" *Id.* at 1259. While the Eleventh Circuit was correct in ruling that *Miranda* warnings are not required in this context, it failed to recognize that the defendant's Fifth and Sixth Amendment interests were nonetheless implicated by the psychiatric evaluation.[19]

In *Smith* v. *Wainwright*, the defendant had apparently obtained the psychiatric expert with his own funds. For this reason, the court found it difficult to regard the psychiatrist as an "agent of the state" or to see how the Fifth Amendment was implicated. What the Eleventh Circuit overlooked was that under this Court's reasoning in *Estelle* v. *Smith*, the psychiatrist becomes an "agent of the state" as soon as he takes the witness stand to testify in aggravation; it is the prosecution's affirmative use of incriminating evidence derived from the evaluation which implicates the Fifth Amendment, and this is so regardless of who requested the evaluation.

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[19] The result in *Smith* v. *Wainwright* may be correct, but not for the reasons given by the Court. Even if the prosecution is precluded by the Fifth, Sixth and Fourteenth Amendments from making affirmative use of evidence derived from the defense-requested mental examination, it might nonetheless be permissible to use such evidence to impeach the defendant's testimony if he chooses to testify. See note 15, *supra*.

Alternatively, the prosecution's affirmative use of incriminating evidence derived from an evaluation initially structured within the framework of the attorney-client relationship, as it was in *Smith* v. *Wainwright*, can be characterized as a violation of the Sixth Amendment and the Due Process Clause. See *United States* v. *Alvarez*, 519 F.2d 1036 (3d Cir. 1975). Whatever the characterization, however, the underlying principle is the same—the defendant needs access to a psychiatric evaluation to defend himself, and his right to defend himself is severely compromised, if not completely undermined, if he must surrender his privilege against self-incrimination as the price for exploring possible defenses in exculpation or mitigation.

D. Affirmative Prosecutorial Use Of Evidence Derived From A Defense-Requested Mental Evaluation Is Already Prohibited In A Substantial Majority Of States And In The Federal Courts.

The rule announced by the Virginia Supreme Court in *Gibson* v. *Commonwealth* and applied in Michael Smith's case has been rejected in a substantial majority of states and in the federal courts. The aberrant nature of Virginia's approach is relevant to this Court's constitutional inquiry for two reasons. First, the Court need not be concerned about the repercussions of a ruling precluding, as a matter of constitutional law, affirmative prosecutorial use of evidence derived from a pretrial mental evaluation requested by the defense. Such a ruling would have little impact outside Virginia, and even in Virginia its impact would be limited.[20] Second, Smith's contention that

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[20] See *Va. Code Ann.* §§ 19.2-169.5E and 19.2-169.7, enacted in 1982. Section 19.2-169.7 provides, in pertinent part, that "no statement or disclosure by the defendant concerning the alleged offense made during [a pretrial mental evaluation or treatment] may be used against the defendant at trial as evidence or as a basis for such evidence, except on the issue of his mental condition at the time of the offense after he raises the issue. . . ." The applicability of this section to capital sentencing is not altogether clear. However, counsel are aware of two cases which might be affected by the decision in Smith's case. See *Giarratano* v. *Commonwealth*, 220 Va. 1064, 266 S.E.2d 94 (1980); *Tuggle* v. *Commonwealth*, 228 Va. 493, 323 S.E.2d 539 (1984), vacated and remanded in light of *Ake* v. *Oklahoma*, *Tuggle* v. *Virginia*, 471 U.S.____, 85 L.Ed. 2d 835 (1985), *affirmed on remand* 229 Va. ____, 334 S.E.2d 838 (1985).

the rule announced in *Gibson* v. *Commonwealth* contravenes fundamental concepts of fairness is reinforced by its widespread rejection in other states.

1. In at least 19 states, statutes, court rules or judicial decisions specifically bar affirmative prosecutorial use of information disclosed during any court-ordered pretrial mental evaluation, whether requested by the defense or the prosecution.[21] Although the precise language of these provisions varies, most preclude use of the disclosures against the defendant except on the issue of mental condition. See also American Law Institute, Model Penal Code § 4.09[22] and American Bar Association Criminal Justice Mental Health Standards § 7-3.2 (1984).[23]

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[21] Citations appear in Appendix A.

[22] M.P.C. § 4.09 provides:

Section 4.09. Statements for Purposes of Examination or Treatment Inadmissible Except on Issue of Mental Condition.

A statement made by a person subjected to psychiatric examination or treatment pursuant to Sections 4.05, 4.06 or 4.08 for the purpose of such examination or treatment shall not be admissible in evidence against him in any criminal proceeding on any issue other than that of his mental condition but it shall be admissible upon that issue, whether or not it would otherwise be deemed a privileged communication [, unless such statement constitutes an admission of guilt of the crime charged].

[23] ABA Standard § 7-3.2 provides, in pertinent part:

Standard 7-3.2. Uses of Disclosures or Opinions Derived from Pretrial Mental Evaluations

(a) Admissibility of disclosures or opinions in criminal proceedings. No statement made by or information obtained from a person, or evidence derived from such statement or information, during the course of any pretrial mental health or mental retardation professional interview or mental evaluation, or during treatment or habilitation, and no opinion of a mental health or mental retardation professional based on such statement, information, or evidence is admissible in any criminal proceeding in which that person is a defendant unless the disclosure or opinion is otherwise admissible under Standard 7-3.9 and:

(i) relates solely to defendant's present mental competency and the use of such disclosure conforms to the requirements of Standard 7-4.6; or,

(ii) is otherwise relevant to an issue raised by defendant concerning defendant's mental condition and defendant intends to introduce the testimony of a mental health or mental retardation professional to support the defense claim on this issue.

In 12 additional states,[24] and in the federal courts, the applicable statute or court rule bars affirmative prosecutorial use of disclosures made during *prosecution-initiated* evaluations, but is silent on the limitations attaching to *defense-initiated* exams; however, in seven of these states and in the federal courts, it appears that disclosures made during defense-initiated evaluations are protected by testimonial privileges.

3. At least 25 states have effectively precluded affirmative prosecutorial use of evidence derived from defense-initiated examinations by providing that such examinations are encompassed by the attorney-client privilege (10 states) or the physician-patient or psychologist-patient privileges (16 states).[25] In some instances, however, the applicable statute or decision is unclear regarding coverage of communications between the defendant and court-appointed experts, although communications between the defendant and privately-retained experts are clearly covered.

4. Six states have overlapping protections derived from pretrial mental evaluation provisions and testimonial privileges. Thus, the net result is that at least 38 states preclude affirmative prosecutorial use of disclosures made by the defendant during defense-requested mental evaluations.

5. In 33 states, these statutes, rules and decisions appear to be clearly applicable to capital sentencing proceedings: the attorney-client or and physician/psychologist-patient privileges (25 states) appear to have general application, and the pretrial evaluation statutes (11 states) permit testimony only on "mental condition" in "any criminal proceeding." In the remaining states, however, the applicable language either expressly applies only to the guilt phase of a criminal trial, or precludes use of the testimony to prove "guilt," rather than limiting it, generally, to proof of "mental condition;" in these

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[24] Citations appear in Appendix B.

[25] California provides protection under both privileges. The citations appear in Appendix C and Appendix D, respectively.

states, the language does not apply, by its own terms, to sentencing proceedings.

6. In summary, at least 38 states already preclude affirmative prosecutorial use of disclosures made by the defendant during a pretrial mental evaluation to prove his guilt, and in 32 of the states, the evidentiary limitation is phrased broadly enough to preclude use of the defendant's disclosures to prove aggravating circumstances at the sentencing phase of a capital case. In most states, the prosecution is permitted to introduce expert testimony only if it is relevant to disprove a claim raised by the defendant concerning his mental condition. These rules are rooted in a long-settled understanding of the constitutional principles implicated by mental evaluations in criminal cases.

II.

THE RECORD DEMONSTRATES THAT THE CONSTITUTIONALLY INADMISSIBLE TESTIMONY BY DR. PILE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

In *Chapman* v. *California*, 386 U.S. 18 (1967), this Court ruled that a constitutional violation may be deemed harmless only when the court is persuaded that it was harmless beyond a reasonable doubt. 386 U.S. at 24. The proper inquiry, according to *Chapman*, is "whether there is a reasonable possibility that the tainted evidence . . . might have contributed to the conviction." 386 U.S. at 23. In the context of a death sentence, the question is whether there is a reasonable possibility that the tainted evidence might have contributed to the jury's decision to impose a death sentence or, conversely, whether the error is "so unimportant and insignificant that [it] may be deemed harmless." 386 U.S. at 22.

There is some indication in this Court's decisions that tainted evidence which "might have contributed to a conviction" may be deemed harmless if the other evidence of guilt is so overwhelming that there is "no reasonable doubt that the jury would have reached the same verdict without hearing the tainted testimony." *Milton* v. *Wainwright*, 407 U.S. 371, 377 (1972). Because the jury's sentencing decision in a capital case

is considerably less structured than its determination of guilt, the capacity of an appellate court to assess what the jury would have done in the absence of the tainted evidence is correspondingly restricted. There is no objective normative marker available to say what portions of the evidence were regarded as "overwhelming." For this reason, the harmlessness of constitutional error at the capital sentencing proceeding should be determined solely by asking whether the evidence might have contributed to the jury's decision. No less demanding standard would take adequate account of the qualitative difference between death and other forms of punishment and the "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

It cannot be said, beyond a reasonable doubt, that Dr. Pile's testimony did not contribute to the jury's decision to recommend a death sentence: it clearly contributed to the jury's finding of the "dangerousness" circumstance; and the dangerousness issue clearly played a pivotal role in the jury's decision to recommend the death penalty.

A. The "Dangerousness" Finding

The prosecution relied on Dr. Pile's description of the school bus incident in its closing argument, App. 31, to support its claim that Smith would be a continuing threat to society and that a death sentence was necessary to incapacitate him. In addition to the capital offense, Smith had been convicted of a previous rape. The self-admitted incident on the school bus added a third behavioral predicate for the prediction, one which may have had a more potent impact on the jury than the seriousness of the incident would otherwise warrant because it tended to show the chronicity of Smith's condition. Moreover, if Dr. Pile had not been permitted to testify, defense counsel would not have blundered into what he conceded was an inexplicable cross-examination, during which he elicited Dr. Pile's diagnosis (sociopathic personality) and his damaging assertions regarding the characteristics of such people and their

poor prospects for behavioral change. App. 7-9.[26] Thus Dr. Pile's testimony in general—and the school bus incident in particular—clearly contributed to the jury's finding on the dangerousness issue.

Dr. Pile's testimony was not merely "cumulative" as the Commonwealth suggested in its brief in the Fourth Circuit. The involuntary confession determined to be harmless beyond a reasonable doubt in *Milton* v. *Wainwright*, 407 U.S. 371 (1972), was indeed cumulative—the prosecution had also introduced two written confessions by the defendant together with statements that he had made when he reconstructed the crime for the police at the scene of its occurrence. This evidence was practically redundant on the same factual issue. In contrast, Dr. Pile's testimony was introduced to provide an *additional factual predicate* for the prediction of future dangerousness which the jury was urged to make and from which it was urged to infer a need to incapacitate Smith by executing him.

The inherently speculative nature of the dangerousness inquiry is reason enough for the Court to decline to undertake the task of assessing whether the other evidence offered by the prosecution was "so overwhelming" that the jury would have found the "future dangerousness" circumstances even in the absence of Dr. Pile's testimony. Both the Texas Court of Criminal Appeals and the Fifth Circuit have declined to do so when considering the effect of psychiatric testimony admitted in violation of this Court's ruling in *Estelle* v. *Smith*.See, e.g., *Clark* v. *State*, 627 S.W.2d 693, 697-98 (Tex. Cr. App. 1981); *White* v. *Estelle*, 720 F.2d 415, 418 (5th Cir. 1983); *Green* v.

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[26] Smith has unsuccessfully sought to demonstrate that counsel's obviously incompetent cross-examination denied him constitutionally adequate assistance of counsel. Whether or not counsel's defective performance fell below Sixth Amendment standards, it was demonstrably prejudicial. This Court should not close its eyes to counsel's error in assessing the harmful consequences of the constitutional violation committed when the court permitted the prosecution to call Dr. Pile as its witness. *Cf. Fahy* v. *Connecticut*, 375 U.S. 85, 87 (1963) (harmless error analysis must take into account the "effect of [constitutionally inadmissible] evidence upon the other evidence adduced at trial and upon the conduct of the defense").

Estelle, 706 F.2d 148, *rehearing denied with opinion*, 712 F.2d 995 (5th Cir. 1983); *Battie* v. *Estelle*, 655 F.2d 692 (5th Cir. 1981) (state called eleven witnesses to testify concerning defendant's bad reputation and two more who recounted specific acts of violence made by him; yet introduction of psychologists' testimony in violation of *Estelle* v. *Smith* not harmless).

B. The Death Sentence

The jury's questions, both during trial and during its deliberations, demonstrate that the dangerousness issue played a determinative role in its decision to recommend the death penalty. Two jurors interrupted Dr. Dimitris' testimony to ask about the different prognostic implications of Dr. Pile's diagnosis and his own. (App. 17-18.) In addition, the jury suspended its deliberations to ask the trial judge to explain the incapacitative consequences of a life sentence. (Transcript 1096.) Finally, the jury specifically declined to find that Smith's conduct in committing the offense manifested "depravity of mind" by striking this language on the verdict form (App. 39).[27] This determination is especially important because it shows that the jury was persuaded by Smith's claim that his criminal behavior was attributable to psychological aberration rather than an evil character, and that the death sentence was based on the jury's judgment that the aggravating circumstances, especially dangerousness, outweighed the mitigating circumstances, rather than on a judgment that mitigating circumstances did not exist.

It is conceivable, of course, that the jury would have imposed the death penalty even had it not found the Petitioner to be "dangerous." However, in light of the prosecution's closing argument and the juror's questions, the record demonstrates a substantial likelihood that its finding of dangerousness tipped the balance leading to the jury's decision "to recommend" the death penalty. In short, this Court must assume that the

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[27] The so-called "vileness" circumstance provides: "that [the defendant's] conduct in committing the offense . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim."

sentence of death was based, to a determinative degree, on its finding of dangerousness, a finding clearly influenced by Dr. Pile's inadmissible testimony.[28]

III

NOTHING IN THIS COURT'S DECISION IN *ZANT* V. *STEPHENS* SUGGESTS THAT A PREJUDICIAL CONSTITUTIONAL DEFECT IN THE SENTENCING PROCESS SHOULD BE IGNORED SIMPLY BECAUSE THE STATE PROVED AN UNTAINTED STATUTORY PREDICATE FOR A DEATH SENTENCE.

The Fourth Circuit assumed, without deciding, that Dr. Pile's testimony was constitutionally inadmissible and that it tainted the jury's finding of future dangerousness. However, the court nonetheless refused to set aside Smith's death sentence, apparently concluding that a demonstrably prejudicial error in the capital sentencing process may be ignored as long as the error does not taint every aggravating circumstance. For this sweeping and unprecedented proposition, the Fourth Circuit relied upon this Court's decision in *Zant* v. *Stephens*, 462 U.S. 862 (1983). However, this construction of *Zant* v. *Stephens* is fundamentally misconceived.

A. The Fourth Circuit's Handling Of The Issue.

In its opinion below, the Fourth Circuit correctly noted that the

> jury's verdict recommending a death sentence was supported by two separate and distinct grounds of aggravation: (a) dangerousness (*i.e.*, violence) and (b) vileness. The asserted errors of constitutional dimension relating to the admission of psychiatric testimony were in testimony directed to the question of "dangerousness." The evidence presented to the jury supporting a showing of "vileness" was unchallenged.

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[28] It is noteworthy that the Fourth Circuit characterized Dr. Pile's testimony as "severely damaging" to Smith, 769 F.2d at 172 and that neither Judge Carneal nor the federal magistrate made any finding to the contrary.

Smith v. *Procunier*, 769 F.2d 170, 173 (4th Cir. 1985). However, the Court's reasoning took a breathtaking leap when it concluded that, as far as the Constitution is concerned "any one aggravating circumstance deemed sufficient by the jury suffices," *id.*, relying upon *Linwood Briley* v. *Bass*, 742 F.2d 155, 165 (4th Cir. 1984),[29] and *Zant* v. *Stephens*, 462 U.S. 862, 884 (1983).

It is certainly true that a finding of an aggravating circumstance "suffices" to establish a constitutionally adequate predicate for a death sentence if the aggravating circumstance "genuinely narrow[s] the class of persons eligible for the death penalty" and "reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant* v. *Stephens*, 462 U.S. at 877. But the finding of an aggravating circumstance does not foreclose constitutional scrutiny of other aspects of a sentencing hearing.

For example, the finding of an aggravating circumstance does not "suffice" to establish the constitutionality of a death sentence when the defendant was precluded from introducing evidence concerning his character or record as a basis for mitigation; *Lockett* v. *Ohio*, 438 U.S. 586 (1978), established that the defendant has a constitutional right to an individualized determination of the propriety of a death sentence. Nor does the finding of an aggravating circumstance "suffice" to establish the constitutionality of a death sentence when the sentencer considered unreliable evidence which the defendant had no opportunity to confront and cross-examine; *Gardner* v. *Florida*, 430 U.S. 349 (1977), established that the defendant has a right to a fair and reliable determination of the disputed issues in a capital sentencing proceeding.

Thus, it is clear that a finding of a valid aggravating circumstance does not "suffice" to override any and all constitutional

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[29] The Fourth Circuit's citation to its own decision in *Linwood Briley* v. *Bass* was not pertinent since Briley objected only to the phraseology of the "vileness" instruction and did not claim either that the evidence was legally insufficient to establish the circumstance *or*, more importantly, that otherwise inadmissible evidence had been offered to prove it.

defects in a capital sentencing hearing. In Smith's case, evidence introduced by the prosecution to prove its case-in-aggravation and to persuade the jury to impose a death sentence was constitutionally inadmissible under the Fifth Amendment, and this evidence had a prejudicial impact on the jury's deliberations. The fact that the state satisfied its burden of proving one statutory aggravating circumstance with untainted evidence does not "suffice" to erase the prejudicial impact of the constitutional error.

How does the Fourth Circuit explain its contrary conclusion? It fails to offer any explanation at all. In lieu of an explanation, the Court merely offers a quotation from this Court's opinion in *Zant* v. *Stephens*, 462 U.S. at 884:

> [A] death penalty supported by at least one valid aggravating circumstance need not be set aside . . . simply because another aggravating circumstance in "invalid" in the sense that it is insufficient itself to support the death penalty.

This quotation, which constitutes the sum total of the Fourth Circuit's treatment of *Zant* v. *Stephens*, was taken out of context, omits important limiting language, and fundamentally distorts this Court's ruling.

B. This Court's Ruling In Zant v. Stephens.

The issue in *Zant* v. *Stephens*, as stated by this Court, was:

> [W]hether respondent's death penalty must be vacated because one of the three statutory aggravating circumstances found by the jury was subsequently held to be invalid by the Supreme Court of Georgia, although the other two aggravating circumstances were specifically upheld.

462 U.S. at 864. The Court noted at the outset of its analysis that:

> The answer depends on the function of the jury's finding of an aggravating circumstance under Georgia's capital sentencing statute, and on the reasons that the aggravating circumstance at issue in this particular case was found to be invalid.

Id.

Stephens' death sentence had been imposed on the basis of three aggravating circumstances: (1) that Stephens had a "substantial history of serious assaultive criminal convictions"; (2) that the offense was outrageously or wantonly vile, horrible or inhuman; and (3) that the offense was committed by someone who had escaped from custody.

In support of the first circumstance, the State offered evidence concerning Stephens' prior criminal record—two counts of armed robbery, five counts of burglary, and one count of murder.

While Stephens' case was pending in the Georgia Supreme Court, that court ruled that the first aggravating circumstance was fatally vague. When Stephens' case was heard, his death sentence was affirmed by the Georgia Supreme Court on the basis of the two remaining aggravating circumstances.

The Fifth Circuit reversed, concluding that the death penalty was invalid because the jury had based its death sentence in part on an invalid aggravating circumstance. This Court summarized the Fifth Circuit's reasoning as follows:

> The Court of Appeals gave two reasons for that conclusion. First, it read *Stromberg* v. *California*, 283 U.S. 359 (1931), as requiring that a jury verdict based on multiple grounds must be set aside if the reviewing court cannot ascertain whether the jury relied on an unconstitutional ground. . . .
>
> Second, it believed that the presence of the invalid circumstance "made it possible for the jury to consider several prior convictions of [respondent] which otherwise would not have been before it." 631 F.2d 397, 405-406 (CA5 1980).
>
> In a petition for rehearing, the State pointed out that the evidence of respondent's prior convictions would have been admissible at the sentencing hearing even if it had not relied on the invalid circumstance. The Court of Appeals then modified its opinion by deleting its reference to the possibility that the jury had relied on inadmissible evidence. 648 F.2d 446 (CA5 1981). It maintained, however, that the reference in the instructions to the invalid circumstance "may have unduly directed the jury's attention to his prior convictions." The court concluded, "It cannot be

> determined with the degree of certainty required in capital cases that the instruction did not make a critical difference in the jury's decision to impose the death penalty."

Zant v. *Stephens*, 462 U.S. at 868-869.

Because the Fifth Circuit had acknowledged that no inadmissible evidence had been introduced at the sentencing hearing, this Court's reversal of the judgment hinged on two determinations—that the Fifth Circuit had misunderstood *Stromberg*, and that the instruction on the improper aggravating circumstance did not materially affect the jury's deliberations.

This Court first analyzed *Stromberg*, finding two possibilities for error:

> [First,] a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient because the verdict may have rested exclusively on the insufficient ground. . . .
>
> [Second,] the reasoning of *Stromberg* encompasses a situation in which the general verdict on a single-count indictment or information rested on *both* a constitutional and an unconstitutional ground.

Zant v. *Stephens*, 462 U.S. at 881-882.

The Court concluded that the second rule applied only to cases in which the punishment was being imposed or heightened because the defendant had exercised his First Amendment rights, and that Georgia's aggravating circumstances did not involve any constitutionally protected activity. Therefore there was no *Stromberg* infirmity:

> [A] death sentence supported by at least one valid aggravating circumstance need not be set aside *under the second Stromberg rule* simply because another aggravating circumstance is "invalid" in the sense that it is insufficient by itself to support the death penalty.

Id. at 884. (emphasis added).[30]

Having disposed of the *Stromberg* issue, the Court went on to consider whether the invalid instruction had a constitutionally prejudicial impact on the jury's deliberations. The Court first noted that the invalid aggravating circumstance pertained to a constitutionally permissible inquiry and that the evidence offered to prove it—Stephens' record of criminal convictions—was otherwise admissible under state and federal law. Thus, the alleged constitutional defect arising from the invalid circumstance related solely to the giving of the instruction itself. The question to be decided was whether the emphasis on Stephens' prior record in the invalid instruction amounted to a constitutional defect in the sentencing process. The Court concluded that it did not, because an instruction directing the jury to take into account the defendant's prior record would be constitutionally permissible. Moreover, the Court observed, the Georgia Supreme Court had properly concluded that the error had "an inconsequential impact on the jury's decision." *Id.* at 889.

This Court meant to be taken at its word when it said, at the outset of the relevant portion of the opinion, that "although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." *Id.* at 885. The Court carefully scrutinized the possible impact of the erroneous instruction to ascertain whether the error was of constitutional magnitude.

The critical factor in the Court's analysis was the essentially unobjectionable nature of the evidence adduced to prove the invalid aggravating circumstance—Stephens' record of criminal convictions. The Court emphasized that "the evidence on which the jury might have relied [concerning Stephens' prior

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[30] The underscored portion of this excerpt was left out of the quotation used by the Fourth Circuit in its opinion. As this explanation of its context shows, the omission of the underscored phrase converted a very narrow principle into a sweeping rule of law that far exceeds the ruling of this Court.

record] was properly adduced at the sentencing hearing," *id.* at 887, and that "[n]othing in the United States Constitution prohibits a trial judge from instructing a jury that it would be inappropriate to take account of a defendant's prior criminal record in making sentencing determinations. . . ." *Id.* at 888. In other words, the Court emphasized that there was no independent constitutional defect in the proceedings. The Court explicitly endorsed the observation of the Georgia Supreme Court that "[a] different result might be reached in a case where evidence was submitted in support of a statutory aggravating circumstance which was not otherwise admissible, and therefore the circumstance failed." *Id.* at 890, *quoting* 250 Ga. 97, 101, 297 S.E.2d 1, 4 (1982). Moreover, the Court also noted that counsel for Georgia had acknowledged that "if an invalid statutory aggravating circumstance were supported by material evidence not properly before the jury, a different case would be presented." 462 U.S. at 887, n.24. Finally, the Court specifically emphasized the limited nature of its holding when it stated that "[w]e need not decide in this case whether the death sentence would be impaired in other circumstances, for example, if the jury's finding of an aggravating circumstance relied on materially inaccurate or misleading information." *Id.*

Most other courts that have interpreted *Zant* v. *Stephens* have not been faced with the specific issue presented here—where the error alleged in the capital sentencing proceeding was the introduction of constitutionally inadmissible evidence. The Delaware Supreme Court recognized this distinction:

> The *evidence* considered by the jury in making its determination was *not constitutionally objectionable*. Therefore, we deem any error in considering the invalid statutory aggravating circumstance as harmless.

Flamer v. *State*, 490 A.2d 104, 136 (Del. 1984) (emphasis added). Likewise, the Eleventh Circuit has read and understood *Zant* v. *Stephens:*

> In *Stephens* the Court held that the *underlying evidence* introduced by the invalid factor was properly admissible at the sentencing hearing under both Georgia law *and the United States Constitution.*

Ritter v. *Smith*, 726 F.2d 1505, 1518 (11th Cir. 1984) (emphasis added).[31]

Where constitutionally inadmissible evidence has tainted a capital sentencing hearing, this Court must be convinced beyond a reasonable doubt that the error did not contribute to the defendant's death sentence. *Chapman* v. *California*, 386 U.S. 18 (1967). *See Cape* v. *Francis*, 741 F.2d 1287, 1294 (11th Cir. 1984); *Gholson* v. *Estelle*, 675 F.2d 734, 745 (5th Cir. 1982) (Dyer, J., specially concurring).

In Michael Smith's case, the jury's finding of an aggravating circumstance and its decision to recommend a death sentence were demonstrably influenced by constitutionally inadmissible evidence. Unlike the instructional error in *Zant* v. *Stephens*, the admission of Dr. Pile's testimony in violation of the Fifth Amendment "can [] fairly be regarded as a constitutional defect in the sentencing process." *Id.* at 889. Nothing in *Zant* v. *Stephens* even remotely suggests that the federal courts should ignore an evidentiary error of independent constitutional magnitude simply because an untainted finding established an adequate statutory predicate for a death sentence.

The Fourth Circuit's reading of *Zant* v. *Stephens* is both breathtaking in its implications and unprecedented. Under the Fourth Circuit's interpretation, any evidentiary error, no matter how prejudicial in fact, would be regarded as constitutionally harmless unless it tainted every aggravating circumstance.[32] Counsel have been able to identify only one

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[31] A death sentence was reversed in *State* v. *Williams*, 690 S.W.2d 517 (Tenn. 1985), because the "vileness" aggravating circumstance could only be supported by an unconstitutional statement of a non-testifying codefendant, the admission of which against Williams violated *Bruton* v. *United States*, 391 U.S. 123 (1968).

[32] Consider, for example, the error occurring in *Estelle v. Smith*, 451 U.S. 454 (1981), where psychiatric testimony was unconstitutionally admitted to prove a future dangerousness circumstance identical to that found in the Virginia statute. In Texas, the dangerousness finding is a necessary predicate for a death sentence and is also the vehicle for introduction of mitigating evidence. However, suppose that the facts occurring in *Estelle* v. *Smith* had occurred in Virginia—the same surprise examination without notice to coun-

other case—a recent decision of the Virginia Supreme Court—relying upon a similar interpretation.[33] This Court should reverse the erroneous judgment of the Fourth Circuit.

CONCLUSION

This Court should rule that Dr. Pile's testimony was constitutionally inadmissible, and should hold, as has almost every court that has considered the issue, that evidence derived from a pretrial mental evaluation requested by the defense may not be used affirmatively by the prosecution to prove the elements of its case. This ruling is necessary to assure that defendants have meaningful access to the expert evaluation and assistance to which they are constitutionally entitled under *Ake* v. *Oklahoma*. Unless the prosecution is barred from making affirmative use of evidence derived from the evaluation, the defendant is unfairly required to choose between his right to an adequate mental evaluation and his privilege against self-incrimination.

This Court should also rule that Dr. Pile's testimony was not harmless beyond a reasonable doubt because of the significant likelihood that it contributed to the jury's finding of the "future dangerousness" aggravating circumstance and that the dangerousness finding influenced the jury's decision to recommend

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sel and without any effort to protect Smith's right not to "be made the 'deluded instrument' of his own execution." 451 U.S. at 462. Would this Court have regarded the violation of Smith's Fifth Amendment rights as harmless simply because the jury found both dangerousness and vileness as aggravating circumstances?

[33] In *Tuggle* v. *Commonwealth*, 229 Va. ____, 334 S.E.2d 838 (1985) the Virginia Supreme Court acknowledged, after remand from this Court, see *Tuggle* v. *Virginia*, 471 U.S. ____, 85 L.Ed.2d 835 (1985), *vacating and remanding* 228 Va. 493, 323 S.E.2d 539 (1984), that the trial court's refusal to allow Tuggle to obtain a private psychiatric evaluation to rebut the Commonwealth's use of expert testimony to prove future dangerousness was constitutionally erroneous under *Ake* v. *Oklahoma*. However, the court ruled that this error was harmless because it did not taint the jury's finding of "vileness." The Virginia Supreme Court therefore rejected the Attorney General's concession that Tuggle was entitled to a new sentencing hearing, and reaffirmed the death sentence. 334 S.E.2d at 846 n.5.

death sentence. The Court should also hold that nothing in its decision in *Zant* v. *Stephens* suggests that a prejudicial constitutional defect in the capital sentencing process should be ignored simply because the state proved an untainted statutory predicate for a death sentence.

Accordingly, this court should reverse the judgment of the Fourth Circuit and set aside Michael Smith's sentence of death.

Respectfully submitted,

*J. LLOYD SNOOK, III
230 Court Square
Charlottesville, Virginia 22901
804-293-8185

RICHARD J. BONNIE
University of Virginia School of Law
Charlottesville, Virginia 22901

** Counsel of Record*
Counsel for Petitioner

APPENDIX

APPENDIX A

States Prohibiting Affirmative Prosecutorial Use Of Disclosures Made By Defendants In All Court-Ordered Mental Examinations, Whether Requested By Prosecution Or Defense.

ALA. CT. R. CRIM. PROC. 5(B)2.

ARIZ. CT. R. CRIM. PROC. 11.7(b).

CALIF.: *People* v. *Slone*, 76 Cal. App. 3d 611, 143 Cal. Rptr. 61 (1978); *In re Spencer*, 63 Cal. 2d 400, 406 P.2d 33, 46 Cal. Rptr. 753 (1965); *People* v. *Murtishaw*, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981), *cert. denied*, 455 U.S. 922 (1982).

HAWAII REV. STAT. § 704-416 (1976).

IDAHO CODE § 18-215 (Supp. 1985).

IND.: *Phelan* v. *State*, 273 Ind. 542, 406 N.E.2d 237 (1980).

IOWA: *State* v. *Craney*, 347 N.W.2d 376 (1975).

MASS. GEN. LAWS ANN. ch. 233 § 23(B) (West Supp. 1985).

MICH. COMP. LAWS ANN. § 768.20(A) (West Supp. 1985).

MINN. CT. R. CRIM. PROC. 20.02(6).

MISS.: *Williamson* v. *State*, 330 So. 2d 272 (1976).

MO. ANN. STAT. 552.030(6) (Vernon Supp. 1985).

NEV.: *McKenna* v. *State*, 98 Nev. 38, 639 P.2d 557 (1982).

N.M. CT. R. CRIM. PROC. DIST. CT. 35(D).

N.Y. CRIM. PROC. LAW § 60.55(2) (McKinney Supp. 1984-1985).

N.D. R. CRIM. PROC. 12.1(c) (Supp. 1985).

OHIO REV. CODE ANN. § 2945.39 (Page 1982).

VT. STAT. ANN. tit. 13 § 4816 (1974).

VA. CODE § 19 2-169.7 (1983).

APPENDIX B

States Prohibiting Affirmative Prosecutorial Use Of Disclosures Made by Defendants In Court-Ordered Mental Evaluations Requested By The Prosecution.

1. Evaluations Of Competency To Stand Trial And Mental Condition At Time Of Offense.

COLO. REV. STAT. § 16-8-107 (1973).

CONN.: *State* v. *Fair*, 197 Conn. 106, 496 A.2d 461 (1985).

DEL.: *McCarthy* v. *State*, 372 A.2d 180 (1977); *State* v. *Mulrine*, 55 Del. 65, 183 A.2d 831 (1962).

ILL. ANN. STAT. ch. 38, § 115-6 (Smith-Hurd Supp. 1985).

N.J.: *State* v. *Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965).

OKLA.: *Noyes* v. *State*, 516 P.2d 1368 (1973).

PA.: *Commonwealth* v. *Pomponi*, 447 Pa. 154, 284 A.2d 708 (1971).

S.C.: *State* v. *Meyers*, 220 S.C. 309, 67 S.E.2d 506 (1951).

S.D. CODIFIED LAWS ANN. § 23A-10-4 (1979).

TENN. CT. R. CRIM. PROC. 12.2(c).

W.VA. CT. R. CRIM. PROC. 12.2(c).

D.C.: *White* v. *United States*, 451 A.2d 848 (1982).

2. Evaluations Of Competency To Stand Trial Only

FLA. CT. R. CRIM. PROC. 3.211(e).

KAN. STAT. ANN. § 22-3302(3) (Supp. 1984).

LA.: *State* v. *Breaux*, 337 So. 2d 182 (1976).

N.J. STAT. ANN. § 2C:4-10 (1982).

R.I. GEN. LAWS § 40.1-5.3-3(J) (1984).

TEX. CRIM. PROC. CODE § 46.02(3)g (Vernon 1979).

APPENDIX C

Decisions Holding That Defense-Requested Mental Evaluations Are Protected By The Attorney-Client Privilege.

ALASKA: *Houston* v. *State*, 602 P.2d 784 (1979).

* CALIF. *People* v. *Lines*, 13 Cal. 3d 500, 531 P.2d 793, 119 Cal. Rptr. 225 (1975).

* CONN.: *State* v. *Toste*, 178 Conn. 626, 424 A.2d 293 (1979).

FLA.: *Pouncy* v. *State*, 353 So. 2d 640 (1977).

MD.: *State* v. *Pratt*, 284 Md. 516, 398 A.2d 421 (1979).

* N.J.: *State* v. *Kociolek*, 23 N.J. 400, 129 A.2d 417 (1957).

N.Y.: *People* v. *Edney*, 39 N.Y.2d 620, 350 N.E.2d 400, 385 N.Y.S.2d 23 (1976). See also *Edney* v. *Smith*, 425 F.Supp. 1038, *aff'd without op.* 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1976).

S.C.: *State* v. *Hitopoulous*, 279 S.C. 549, 309 S.E.2d 747 (1983).

TEXAS: *Ballew* v. *State*, 640 S.W.2d 237 (1980).

* WASH.: *State* v. *Jones*, 99 Wash. 2d 735, 664 P.2d 1216 (1983).

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* Explicitly applies to court-ordered evaluations conducted for indigent defendants.

APPENDIX D

States In Which Physician-Patient, Psychologist-Patient Or Psychotherapist-Patient Privileges Protect Disclosures Made By Criminal Defendants During Pretrial Mental Evaluations.

ALA.: *Ex Parte Day*, 378 So.2d 1159 (1979).

* ARIZ.: *State* v. *Shaw*, 106 Ariz. 103, 471 P.2d 715 (1970), *cert. denied*, 400 U.S. 1009 (1971); *State* v. *Evans*, 104 Ariz. 434, 454 P.2d 976 (1969).

ARK. STAT. ANNN. § 28-1001, R. EVID. 503 (1977).

CAL. EVID. CODE §§ 952, 954, 1017 (West Supp. 1985).

* COLO.: *People* v. *Rosenthal*, 617 P.2d 551 (1980).

DEL.: *McKinney* v. *State*, 466 A.2d 356 (1983); DEL. CODE ANN. tit. 16, UNIF. R. EVID. 503 (1974).

* HAWAII REV. STAT. § 626-1, R. EVID. 504.1 (Special Pamphlet 1980).

* ILL.: *People* v. *Newbury*, 53 Ill.2d 228, 290 N.E.2d 592 (1972).

KY. STAT. ANN. § 421.215 (1972).

* ME. CT. R. EVID. 503(c).

* MO.: *State* v. *Speedy*, 543 S.W.2d 251 (1976); MO. ANN. STAT. § 491.060(5) (Vernon Supp. 1985).

* N.H.: *State* v. *Kupchin*, 117 N.H. 412, 373 A.2d 1325 (1977).

TENN. CODE ANN. § 24-1-207 (1980).

UTAH CODE ANN. § 58-25-8 (Supp. 1985).

WISC. STAT. ANN. § 905.04(4) (West Supp. 1985).

WYO. STAT. § 33-27-103 (1977).

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* Explicitly applies to court-ordered evaluations for indigent defendants.